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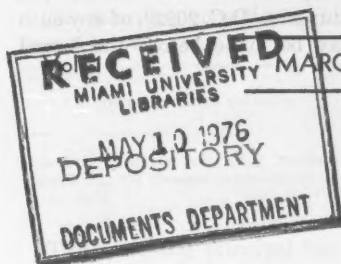
Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Customs and
Patent Appeals and the United States
Customs Court



MARCH 10, 1976

No. 10

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T.D. 76-51 through 76-61

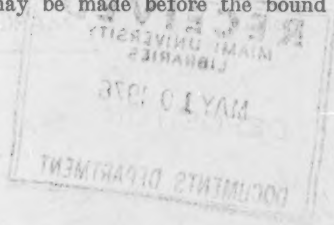
C.D. 4634 and 4635

Protest abstracts P76/32 through P76/36

DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

(T.D. 76-51)

Bonds

Discontinuance of consolidated aircraft bond (air carrier blanket bond) Customs Form 7605

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 18, 1976.

The following consolidated aircraft bond has been discontinued as shown below:

Name of principal and surety	Date term commences	Date of approval	Filed with district director of Customs; amount
Modern Air Transport Inc., 825 S. Bayshore Dr., Miami, FL; The Travelers Indemnity Co. D 2/20/76	May 11, 1971	June 14, 1971	Miami, FL; \$100,000

The foregoing principal has not been designated as a carrier of bonded merchandise.

(BON-3-01)

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

(T.D. 76-52)

Notice of Recordation of Trade Name

EUROTIME

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 19, 1976.

On December 30, 1975, there was published in the *FEDERAL REGISTER* (40 FR 59750) a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name *EUROTIME* used by Eurotime Corporation. The notice advised that prior to final action on the application, filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), consideration would be given to relevant data, views, or arguments submitted in opposition to the recordation and received not later than 30 days from the date of publication of the notice. No responses were received in opposition to the application.

The name "*EUROTIME*" is hereby recorded as the trade name of Eurotime Corporation, a corporation organized under the laws of the State of New York, located at 212 Fifth Avenue, New York, New York 10010, when applied to watches and clocks and components for each, manufactured in Switzerland, West Germany, France and Hong Kong. No foreign person, partnership, association or corporation is authorized to use the trade name.

(TMK-2-R:E:R)

LEONARD LEHMAN,
*Assistant Commissioner,
Regulations and Rulings.*

[Published in the *FEDERAL REGISTER* February 24, 1976 (41 FR 8083)]

(T.D. 76-53)

Customs Delegation Order No. 54

Order of the Commissioner of Customs delegating authority, with respect to the withholding from compensation due Customs employees any amounts erroneously paid such employees, to the Regional Commissioners and the Assistant Commissioner, Office of Administration

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 19, 1976.

By virtue of the authority vested in me by 5 U.S.C. 5514, and by Treasury Department Circular No. 871, First Supplement, dated November 12, 1954, I hereby delegate to the Assistant Commissioner, Office of Administration, insofar as employees in the Customs Service headquarters are concerned, and to the Regional Commissioners of Customs, insofar as employees in their regions are concerned, the authority to withhold from compensation due Customs employees any amounts erroneously paid such employees. The deductions shall be in accordance with the provisions of 5 U.S.C. 5514 and Treasury Department Circular No. 871, First Supplement, dated November 12, 1954.

This order shall take effect upon publication in the FEDERAL REGISTER.

(ADM-9-03)

VERNON D. ACREE,
Commissioner of Customs.

[Published in the FEDERAL REGISTER February 27, 1976 (41 FR 8508)]

(T.D. 76-54)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 11, 1976.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:

January 19, 1976.....	\$0. 2000
January 20, 1976.....	. 2000
January 21, 1976.....	. 2000
January 22, 1976.....	. 2000
January 23, 1976.....	. 1995

Iran rial:

January 19, 1976.....	\$0. 0150
January 20, 1976.....	. 0150
January 21, 1976.....	. 0150
January 22, 1976.....	. 0150
January 23, 1976.....	. 0144

Philippines peso:

January 19, 1976.....	\$0. 1330
January 20, 1976.....	. 1330
January 21, 1976.....	. 1330
January 22, 1976.....	. 1350
January 23, 1976.....	. 1350

Singapore dollar:

January 19, 1976.....	\$0. 4031
January 20, 1976.....	. 4027
January 21, 1976.....	. 4025
January 22, 1976.....	. 4025
January 23, 1976.....	. 4020

Thailand baht (tical):

January 19-23, 1976..... \$0.0490

(LIQ-3-O:D:T)

JAMES D. COLEMAN,
Acting Director,
Duty Assessment Division.

(T.D. 76-55)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 9, 1976.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:

January 26-30, 1976..... \$0.1995

Iran rial:

January 26, 1976..... \$0.0144

January 27, 1976..... .0144

January 28, 1976..... .0144

January 29, 1976..... .0144

January 30, 1976..... .0145

Philippines peso:

January 26, 1976..... \$0.1350

January 27, 1976..... .1350

January 28, 1976..... .1350

January 29, 1976..... .1350

January 30 1976..... .1335

Singapore dollar:

January 26, 1976	.....	\$0. 4017
January 27, 1976	.....	. 4030
January 28, 1976	.....	. 4030
January 29, 1976 4014
January 30, 1976 4018

Thailand baht (tical):

January 26-30, 1976	\$0. 0490
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(LIQ-3-O:D:T)

JAMES D. COLEMAN,
Acting Director,
Duty Assessment Division.

(T.D. 76-56)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 11, 1976.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:

February 2, 1976	.....	\$0. 1995
February 3, 1976	.....	. 1995
February 4, 1976	.....	. 2000
February 5, 1976 2000
February 6, 1976 1995

Iran rial:

February 2-6, 1976	\$0. 0145
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Philippines peso:

February 2, 1976-----	\$0. 1335
February 3, 1976-----	. 1347
February 4, 1976-----	. 1347
February 5, 1976-----	. 1347
February 6, 1976-----	. 1330

Singapore dollar:

February 2, 1976-----	\$0. 4018
February 3, 1976-----	. 4036
February 4, 1976-----	. 4026
February 5, 1976-----	. 4036
February 6, 1976-----	. 4032

Thailand baht (tical):

February 2-6, 1976-----	\$0. 0490
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(LIQ-3-O:D:T)

JAMES D. COLEMAN,
Acting Director,
Duty Assessment Division.

(T.D. 76-57)

Foreign currencies—Certification of rates

Rates of exchange certified to the Secretary of the Treasury by the
Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 11, 1976.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 76-30 for the following country. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to

convert such currency into currency of the United States, conversion shall be at the following daily rates:

Italy lira:

February 2, 1976.....	\$0.001307
February 3, 1976.....	.001305
February 4, 1976.....	.001323
February 5, 1976.....	.001323
February 6, 1976.....	.001336

(LIQ-3-O:D:T)

JAMES D. COLEMAN,
Acting Director,
Duty Assessment Division.

[Published in the FEDERAL REGISTER February 27, 1976 (41 FR 8508)]

(T.D. 76-58)

Bolster Covers

Decision in C.D. 4572 (decided December 9, 1974), holding bolster covers to be classifiable under the provision for unornamented cotton bolster cases in item 363.30, Tariff Schedules of the United States, limited

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 20, 1976.

In *Brentwood Originals v. United States*, C.D. 4572, the United States Customs Court held that certain cotton covers for cushions of the type chiefly used on beds for nonsleeping purposes are classifiable under the provision for cotton sheets and pillowcases (including bolster cases), in item 363.30, Tariff Schedules of the United States (TSUS).

The United States Customs Service believes that the merchandise which was the subject of C.D. 4572 is not the type of merchandise which was intended to be classifiable in item 363.30, TSUS. Instead, it is believed that the subject merchandise is properly classifiable under the provision for other bedding of vegetable fibers, in item 363.60, TSUS, a provision which was not considered by the court.

Accordingly, the court's decision in C.D. 4572 is limited to the entries before the court in that case. (038456)

(CLA-2-R:CV)

G. R. DICKERSON,
Acting Commissioner of Customs.

(T.D. 76-59)

Ports of Entry—Customs Regulations amended

Section 1.2(c), Customs Regulations, amended to reflect the transfer of the County of Richmond (Staten Island, New York) from the Newark Area to the New York Seaport Area

DEPARTMENT OF THE TREASURY,
Washington, D.C., February 20, 1976.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 1—GENERAL PROVISIONS

On October 10, 1975, a notice of a proposal to realign the New York City, New York Customs district (Region II) by transferring the County of Richmond (Staten Island, New York) from the Newark Area to the New York Seaport Area was published in the Federal Register (40 FR 47795). No comments were received from the public in response to the proposal.

Accordingly, by virtue of the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951 (3 CFR Ch. II), and pursuant to authority provided by Treasury Department Order No. 190, Rev. 10 (40 FR 2216), the County of Richmond (Staten Island, New York) is hereby transferred from the Newark Area to the New York Seaport Area.

Hereafter, the Newark Area shall consist of the counties of Sussex, Passaic, Hudson, Bergen, Essex, Union, Middlesex, and Monmouth, all in the State of New Jersey.

The New York Seaport Area shall include all of that part of the State of New York which is not expressly included in the Kennedy Airport Area or in the Customs districts of Buffalo, New York, or Ogdensburg, New York.

To reflect this change, the table in section 1.2(c) of the Customs Regulations (19 CFR 1.2(c)) is amended by inserting "and T.D. 76-59" after "T.D. 71-19" in the column headed "Area" in the New York City, New York, district (Region II).

(Sec. 1, 37 Stat. 434, sec. 1, 38 Stat. 623, as amended (19 U.S.C. 1, 2))

It is desirable to make the benefits of the above-described realignment available to the public and to the Customs Service at the earliest possible date. Therefore, good cause is found for dispensing with the delayed effective date provision of 5 U.S.C. 553(d).

Effective date. This amendment shall be effective upon publication in the FEDERAL REGISTER. (095671)

(ADM-9-03)

DAVID R. MACDONALD,
Assistant Secretary of the Treasury.

[Published in the FEDERAL REGISTER February 27, 1976 (41 FR 8473)]

(T.D. 76-60)

Foreign currencies—Daily rates for countries not on quarterly list

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 19, 1976.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the informa-

tion and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:

February 9, 1976.....	\$0. 1995
February 10, 1976.....	. 1995
February 11, 1976.....	. 1995
February 12, 1976.....	Holiday
February 13, 1976.....	. 1990

Iran rial:

February 9, 1976.....	\$0. 0145
February 10, 1976.....	. 0145
February 11, 1976.....	. 0145
February 12, 1976.....	Holiday
February 13, 1976.....	. 0143

Philippines peso:

February 9, 1976.....	\$0. 1330
February 10, 1976.....	. 1330
February 11, 1976.....	. 1330
February 12, 1976.....	Holiday
February 13, 1976.....	. 1330

Singapore dollar:

February 9, 1976.....	\$0. 4027
February 10, 1976.....	. 4036
February 11, 1976.....	. 4034
February 12, 1976.....	Holiday
February 13, 1976.....	. 4038

Thailand baht (tical):

February 9, 1976.....	\$0. 0490
February 10, 1976.....	. 0490
February 11, 1976.....	. 0490
February 12, 1976.....	Holiday
February 13, 1976.....	. 0500

(LIQ-3-O:D:T)

WILLIAM D. SLYNE,
Acting Director,
Duty Assessment Division.

(T.D. 76-61)

Foreign currencies—Certification of rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., February 19, 1976.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 76-30 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following daily rates:

Italy lira:

February 9, 1976.....	\$0. 001330
February 10, 1976.....	. 001325
February 11, 1976.....	. 001315
February 12, 1976.....	Holiday
February 13, 1976.....	. 001302

Spain peseta:

February 9, 1976.....	\$0. 015015
February 10, 1976.....	. 015025
February 11, 1976.....	. 015175
February 12, 1976.....	Holiday
February 13, 1976.....	. 015095

(LIQ-3-O:D:T)

WILLIAM D. SLYNE,
Acting Director,
Duty Assessment Division.

[Published in the FEDERAL REGISTER March 2, 1976 (41 FR 8988)]

Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza
New York, N. Y. 10007

Chief Judge

Nils A. Boe

Judges

Paul P. Rao
Morgan Ford
Scovel Richardson
Frederick Landis

James L. Watson
Herbert N. Maletz
Bernard Newman
Edward D. Re

Senior Judges

David J. Wilson
Mary D. Alger
Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Customs Decisions

(C.D. 4634)

NORMAN G. JENSEN, INC. v. UNITED STATES

Transportation equipment—Tractors

Certain four-wheeled tractors, models C5D and C6D, denominated "Tree Farmers" by the manufacturer, the primary use of which is for skidding logs, were classified as "other" tractors under item 692.35 TSUS, as modified by T.D. 68-9, and assessed with duty at 5.5 per centum ad valorem. Plaintiff claims said tractors are entitled to free entry under item 692.30 TSUS as tractors suitable for agricultural use. **Held:** Claim for free entry is sustained.

The science of silviculture relates to the growing of trees. It is based on a knowledge of silvics.

As the court perceives the issue, it matters not who uses the "Tree Farmer," that is, whether the trees are harvested by commercial loggers, farmers or itinerant laborers. Nor does it matter whether the end product is utilized for fuel, fencing, lumber, wood-pulp, etc. The harvesting of a timber crop is an agricultural pursuit.

Court No. 73-7-02041

Port of Grand Portage (Duluth)

[Judgment for plaintiff.]

(Decided February 12, 1976)

Barnes, Richardson & Colburn (Joseph Schwartz and James S. O'Kelly of counsel) for the plaintiff.

Rex E. Lee, Assistant General (Andrew P. Vance, Steven P. Florsheim, and Wesley K. Caine, trial attorneys), for the defendant.

FORD, Judge: Certain four-wheeled tractors, models C5D and C6D, denominated "Tree Farmers" by the manufacturer were classified under item 692.35 TSUS, as modified by T.D. 68-9, as "other" tractors and assessed with duty at 5.5 per centum ad valorem. Plaintiff contends said tractors are entitled to entry free of duty under provision of item 692.30 TSUS as tractors suitable for agricultural use.

The parties agree upon the actual and predominant use of the involved tractors. For all practical and commercial purposes they are used to "skid" logs and are accordingly suitable for such use. The question presented by plaintiff is whether forestry is an agricultural pursuit within the meaning of item 692.30, *supra*. Defendant contends the issue is whether logging is an agricultural pursuit within item 692.30, *supra*.

The pertinent statutory provisions read as follows:

Tractors (except tractors in item 692.40 and except automobile truck tractors), whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors:		
692.30	Tractors suitable for agricultural use, and parts thereof	Free
692.35	Other	5.5% ad val.

The record consists of the testimony of fourteen (14) witnesses, seven (7) called on behalf of each party, and the receipt in evidence of nine (9) exhibits for plaintiff and eight (8) for defendant.

The background and experience of the witnesses called on behalf of plaintiff are as follows:

Mr. Raymond Charles Glavish, Thunder Bay, Ontario, Canada, has been employed by the Canadian Car Division, Hawker Siddeley Canada, Ltd. for 11 years. He has had various management and marketing positions, including general manager of Can-Car, Inc. from 1963 to 1973. He has acquired familiarity with Tree Farmers through sale and distribution and actually observing the tractors in use "in most every state" where timber is harvested.

Mr. Harold Morgan Murphy, Montgomery, Alabama, is president of Leary & Owens Equipment Company. He has purchased Tree Farmer log skidders from Can-Car, Inc. (including those in entries 101150 and 101146) and has sold them in Alabama and Florida.

Mr. Horace W. Johnson, Isle of Palms, South Carolina, is a forestry equipment dealer in Moncks Corner, South Carolina. He has purchased Tree Farmers from Can-Car, Inc. for five years.

Mr. Clyde Alvin Dyson, Springfield, Georgia, has been a logging contractor for seven years. He has used a Tree Farmer for two years.

Mr. Ronda Wayne Dunn, Alexandria, Louisiana, is district sales manager for Can-Car, Inc., Atlanta, Georgia. He calls on dealers west of the Mississippi River. He has been with Can-Car, Inc. for four and one-half years and is a graduate of Auburn University, Department of Forestry under the School of Agriculture.

Mr. Walter Furgat, Brattleboro, Vermont, is president of Furgat Tractor & Equipment, Inc. He has sold and serviced farm and forestry equipment for 22 years. He has been a dealer for Can-Car, Inc. in Vermont, New Hampshire, Massachusetts and Connecticut for eight years and has viewed Tree Farmers in use.

Mr. Harry E. Fisher, Grand Marais, Minnesota, is president of North Shore Forest Products, Inc., a logging concern. He has been involved in general administrative and operational supervision for nine and one-half years. He is a graduate of the University of Minnesota School of Forestry. His company owns and uses four Tree Farmer skidders. He has also observed their use throughout northern Minnesota.

A brief description of the background of witnesses called on behalf of defendant is as follows:

Mr. Samuel T. Hudson, Jr., Fairfax, Vermont, has been a county forester with the Department of Forests and Parks, State of Vermont for 16 years. He holds a B.S. degree in forest management from North Carolina State University. He has seen log skidders at work four to six times per month since 1962.

Mr. Harry Gene Gibson, Morgantown, West Virginia, is a research mechanical engineer, project leader with the Forest Service, United States Department of Agriculture. He holds a B.S. degree in mechanical engineering and an M.S. in forest engineering from West Virginia University. He has seen the Tree Farmer in operation and has done some research on four-wheeled skidders.

Dr. John H. Ohman is director of the North Central Forest Experiment Station, U.S.D.A., Forest Service, St. Paul, Minnesota. He holds a B.S. in forest management and a Ph. D. in forest pathology from the University of Minnesota. He does research in all phases of forestry and has worked for the Forest Service approximately 12 years. He has observed log skidders in operation.

Mr. William C. Gooder, Wausau, Wisconsin, has been regional representative for the International Woodworkers of America (a labor union) for three years. He represents some log skidder operators and has seen them at work but he has never worked in a forest nor run a skidder for his livelihood.

Mr. Stanley R. Olsen, Ely, Minnesota, has been a logger for 24 years. He has owned and operated a four-wheeled skidder for two years.

Mr. Ferdinand H. Thums, Isabella, Minnesota, has been a logger for 10 years and has owned two four-wheeled skidders for 6 years.

Mr. Jack Bennis, Chicago, Illinois, is president of three subsidiaries of Pettibone Corp., a forest equipment manufacturer. He supervises manufacturing, engineering and marketing of forest equipment. He has been with the company for 30 years.

The record establishes the imported tractors are predominantly used to skid logs in the harvesting of trees. There is some testimony indicating additional uses with attachments to cut down trees, for site preparation, fertilization, hauling wagons, etc. Illustrative exhibits 1 and 2 depict the imported tractors. The construction and design of the involved tractors make them particularly suitable for skidding logs. These features include four large wheels instead of two, four-wheel drive, articulated design (hinged in the center), weight distribution, logging arch winch and high ground clearance. The tractors are thereby provided with greater maneuverability and utility when operating among trees. The Tree Farmers are sold to tree harvesters, logging contractors, pulpwood companies, woodsmen, farmers and individuals.

Skidding entails the removal of a severed tree trunk from the area in which it was growing to a more suitable place for transportation known as the landing area. According to witnesses Glavish, Dunn, Furgat and Fisher, the fallen tree would have no economic value with-

out the skidding process. In addition, without removal of the tree, it would impede the planting of another crop of trees. The harvesting of trees in the opinion of witnesses Glavish, Johnson, Dunn, Hudson, Fisher and Ohman includes the process of moving a crop of timber. This process terminates when the logs reach the landing area.

The use of the involved tractors for skidding logs from the growing area to the landing area is borne out by the record. The basic disagreement among the witnesses is whether this constitutes an agricultural pursuit or a logging operation. Plaintiff's witnesses Glavish, Johnson, Dyson, Dunn and Fisher consider the planting, cultivating and harvesting of trees an agricultural pursuit. Defendant's witnesses, on the other hand, consider it as logging which is a function of the lumbering industry. According to witnesses Ohman and Bennis lumbering is an industry separate and apart from agriculture. The witness Gooder testified that the labor union representing loggers includes lumbermen and sawmill workers but does not represent agricultural workers. Defendant further contends that since forests do not produce an annual crop and are a renewable natural resource as distinguished from a crop which is planted annually, they do not fall within the understanding of the term agriculture.

The science of silviculture relates to the growing of trees. The definition of this term as contained in *Terminology of Forest Science, Technology, Practice & Products* (Society of American Foresters, Washington, D.C., 1971) is illuminating and reads as follows:

SILVICULTURE (s.c.)

(1) Generally, the science and art of cultivating (i.e. growing and tending) forest crops, based on a knowledge of silvics

(2) More particularly, the theory and practice of controlling the establishment, composition, constitution and growth of forests. [Pp. 240-241.]

The court is aware and may take judicial notice that all forest areas are not maintained for the purpose of timber. The federal government recognizes this in providing the National Forest Wilderness System the objectives of which are set forth in 36 C.F.R. 293.2 and read insofar as is pertinent as follows:

* * * In carrying out such purposes, National Forest Wilderness resources shall be managed to promote, perpetuate, and, where necessary, restore the wilderness character of the land and its specific values of solitude, physical and mental challenge, scientific study, inspiration, and primitive recreation. To that end:

(a) Natural ecological succession will be allowed to operate freely to the extent feasible.

(b) Wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions.

(c) In resolving conflicts in resource use, wilderness values will be dominant to the extent not limited by the Wilderness Act, subsequent establishing legislation, or the regulations in this part.

In addition to the foregoing, Congress by means of H.R. 4728, 75th Congress, 1st Session (May 18, 1937), enacted the Cooperative Farm Forestry Act, which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to aid agriculture, increase farm-forest income, conserve water resources, increase employment, and in other ways advance the general welfare and improve living conditions on farms through reforestation and afforestation in the various States and Territories, the Secretary of Agriculture is authorized in cooperation with the land-grant colleges and universities and State forestry agencies, each within its respective field of activities, according to the statutes, if any, of the respective States, wherever such agencies can and will cooperate, or in default of such cooperation to act directly, to produce or procure and distribute forest trees and shrub planting stock; to make necessary investigations; to advise farmers regarding the establishment, protection, and management of farm forests and forest and shrub plantations and the harvesting, utilization, and marketing of the products thereof; and to enter into cooperative agreements for the establishment, protection, and care of farm- or other forest-land tree and shrub plantings within such States and Territories; and, whenever suitable Government-owned lands are not available, to lease, purchase, or accept donations of land and develop nursery sites for the production of such forest planting stock as is needed to effectuate the purposes of this Act, but not including ornamental or other stock for landscape plantings commonly grown by established commercial nurserymen, and no stock grown in Government and cooperating nurseries shall be allowed to enter regular trade channels. No cooperative reforestation or afforestation shall be undertaken pursuant to this Act unless the cooperator makes available without charge the land to be planted. There is hereby authorized to be appropriated annually not to exceed \$2,500,000 for carrying out the purposes of this Act. This Act shall be known as the Cooperative Farm Forestry Act.

Approved May 18, 1937. [50 Stat. 188.]

Congress in the appropriation for the Forest Service on June 4, 1936 under the heading "Forest influences" stated as follows:

Forest influences: For investigations at forest experiment stations and elsewhere for determining the possibility of increasing the absorption of rainfall by the soil, and for devising means

to be employed in the preservation of soil, the prevention or control of destructive erosion, and the conservation of rainfall on forest or range lands, \$269,152: *Provided*, That \$170,000 of this appropriation shall be available only for maintenance in nurseries of existing stocks and for the free distribution thereof to farmers, in liquidation of the so-called shelter belt project of trees or shrubs in the plains region undertaken heretofore pursuant to appropriations made for emergency purposes. [49 Stat. 1438-39.]

With respect to the shelter belt project referred to *supra*, the following information contained in the *Forestry Handbook* (Ronald Press, 1955) sets forth its benefits as follows:

SHELTERBELTS AND WINDBREAKS. Beneficial Influences. The beneficial influences of windbreaks and shelterbelts have been well established by land users in the United States and many foreign countries. Such plantings diminish by as much as 20 to 30 percent the amount of fuel that is needed to heat a home. Live-stock winter better on less feed and with greater weight gains in the protection of windbreaks and shelterbelts. Properly designed shelterbelts protect cultivated fields from wind erosion and give growing crops considerable protection from wind damage. The saving of one season's crops sometimes compensates for the entire cost of the planting. The average gain in crop yields will more than compensate for the area occupied by shelterbelts. The greatest returns have been realized from plantings established for the protection of orchards. The increase in grade of some fruits frequently runs as much as 25 to 50 percent. The accumulation of water in the form of snow within, and to the leeward of, the shelterbelts is an important factor in building up the ground water supply and providing moisture for growing crops.

The cumulative effect of shelterbelts systematically placed over large acreages has not been thoroughly studied. Such information as we have indicates that the cumulative effect is of considerable importance and should have a place in long-range community planning. [Sec. 6, pp. 63-64.]

From the foregoing it is apparent the growth and production of trees for other than timber use are numerous.

There is of course the growth of trees for timber purposes. *The Book of the States*, Vol. XX (Council of State Governments, Lexington, Ky., 1974-1975), sets forth the following:

More than 70 percent of the Nation's commercial forest land is owned by private citizens and 60 percent is in farms and other nonindustrial holdings involving over 4 million landowners. These are the so-called "small owners" (i.e., less than 500 acres) who own the most productive forest land. Technical forestry assist-

ance is available to these owners through the state forestry organizations on an advisory and educational basis. The state foresters, in many cases, advise owners of larger areas to secure the services of a private consultant. The federal government, through the U.S. Forest Service, provides financial and other assistance to the state foresters in carrying out this program. Assistance and advice to private landowners covers tree planting, timberland improvement, improved harvesting, marketing assistance, and formation of management plans to help meet the owner's objectives. One of the major problems in establishing good forest practices on small private woodlands in some areas of the Nation is lack of adequate markets for local species and small-sized trees. However, on August 10, 1973, the President signed the Agriculture Bill of 1973. Title X of the act includes a Forestry Incentives Program designed to encourage the small private landowner to plant and manage his woodland primarily for timber production. Cost-sharing programs will be developed by the U.S. Forest Service and the State foresters. * * * [P. 488.]

John Frederick Preston authored a book entitled *Farm Wood Crops* (McGraw-Hill, 1st ed., 1949). In chapter 5 entitled "Problems of Forestry on the Farm," the author makes an astute observation:

Farm forestry is not a forestry job on farmland; it is a farm job on forest land. There is a great difference between these two concepts and in the resulting approach to the problem. The starting point in farm forestry is not really forestry at all—it is farm planning. The farm must be analyzed to find out just what place in farm economy the woodland can fill. It is not sufficient to help the farmer sell his ripe timber and to show him how to mark the trees. The farmer must make a momentous decision, namely, that certain specified farmland, over the years, will contribute most to the business of farming if devoted to the growing of forest crops. [P. 58.]

As stated *supra*, it is the position of defendant that since trees are not produced on an annual basis they do not fall within the term agriculture. The court's view is to the contrary.

According to witness Johnson pine trees in the Southern States are harvested 10-15 years after planting. It is noteworthy that not all agricultural crops have annual crops. Newly planted fruit trees do not bear fruit on an annual basis as indicated in the U.S. Department of Agriculture, Leaflet No. 172, entitled "Why Fruit Trees Fail to Bear," which sets forth the following dates of maturity:

The age (from planting) when trees can be expected to bear fruit are as follows:

Variety	Time in Years
Apple.....	2 to 5
Apricot.....	2 to 5
Cherry, sour.....	3 to 5
Cherry, sweet.....	4 to 7
Citrus.....	3 to 5
Fig.....	2 to 3
Peach.....	2 to 4
Pear.....	4 to 6
Plum.....	3 to 6
Quince.....	5 to 6

That the annual harvesting of trees is a desired method is indicated in *Harvesting Timber Crops* by Wackerman, Hagenstein and Michell (McGraw-Hill, 2d ed., 1966), wherein the following statement is made:

* * * All agricultural operations, for example, are directed toward the development of timber stands as rapidly as is consistent with the quality of wood desired. Thinning, pruning, cleaning, and other cultural operations are designed to hasten the growth and development of and to improve the quality of marketable crops of trees; thus harvesting the crop is an achievement resulting from, or made possible by, past forestry efforts.

Harvesting time in the forest, as on the farm, is the time of cash income. It is payday in the woods. Continual harvesting operations day-by-day and year-by-year are much more desirable in the forestry business than infrequent or intermittent harvesting. Hence, most forests are managed for an even harvest flow year-by-year. [P. 7.]

The utilization by the defendant of the *Standard Industrial Classification Manual** for the purpose of indicating that logging is not within the scope of agriculture is not determinative. It is noted that "Forestry" is in the same division—A—as agriculture although in a different group. The growing of trees (forestry) for timber purposes can only come to that position if the crops (trees) are harvested and sent to market.

Without the skidding process, the fallen stem would have no economic or residual value. As the court perceives the issue it matters not who uses the Tree Farmer, that is, whether the trees are harvested by commercial loggers, farmers, or itinerant laborers. Nor does it

* This work was cited in the *Tariff Classification Study Submitting Report* for TSUS as having a great influence on the arrangement of the new classification system.

matter whether the end product is utilized for fuel, fencing, lumber, woodpulp, etc. The harvesting of a timber crop is an agricultural pursuit and remains so until, as stated by witnesses indicated, *supra*, it leaves the forest.

It is a matter of common knowledge, with which this member of the court is personally familiar, that there are those engaged in custom combining of small grain on a commercial basis. This includes both straight combining or swathing after which the grain is allowed to dry 2-4 days before combining with the use of a windrow pick-up. The custom combiners begin their journey in the grain fields of the Southern States during the early days of summer and continue north toward the Canadian border with their combining equipment. In addition many farmers having this equipment do combining for farm neighbors in local areas. The court could not conceive that defendant would seriously contend such custom combining of grain is not agricultural unless performed by the farmer with his own equipment on his own farm. By the same token the harvesting of trees by loggers does not make such action any less an agricultural pursuit.

Hence while logging as a commercial pursuit may be classified by the *Standard Industrial Classification Manual* separately, the harvesting of a timber crop either by a farmer or commercially constitutes, in the court's opinion, the harvesting of a crop. It is also to be noted as indicated, *supra*, that more than 70 percent of forest land is owned by private citizens and that 60 percent is in farm and other nonindustrial holdings. Accordingly the harvesting of trees is an agricultural pursuit in the same manner as the planting bullets utilized to plant trees were held to be agricultural implements. *Border Brokerage Company, Inc. v. United States*, 65 Cust. Ct. 277, C.D. 4089, 343 F. Supp. 1396 (1970), *aff'd* 59 CCPA 151, C.A.D. 1058, 461 F. 2d 1383 (1972).

Defendant argues further that the involved tractors are merely handling equipment and not tractors suitable for agricultural use. Since the pleadings make no claim under any provision for handling equipment this issue is not before the court for determination.

In any event since silviculture and the harvesting of the crop are agricultural pursuits, the skidding of logs to prepare them for market falls within the same category as the fruit boxes involved in *C. J. Tower & Sons v. United States*, 32 Cust. Ct. 54, C.D. 1579 (1954) and the farm cotton wagons in *Richard L. Jones v. United States*, 58 Cust. Ct. 165, C.D. 2920, 265 F. Supp. 945 (1967).

In view of the foregoing, the court finds the tractors involved to be suitable for agricultural purposes. The claim of plaintiff is, therefore, sustained. Judgment will be entered accordingly.

(C.D. 4635)

F. W. MYERS & Co., INC. v. UNITED STATES

*Iron powder**(Atomet 28)*

SPONGE IRON POWDER—POROSITY—MIXED PARTICLES

Iron powder, described as Atomet 28, was classified in liquidation upon entry at Detroit, Michigan, from Canada as "other powders" under TSUS item 608.05, at the duty rate of 0.3 cents per pound, and it is claimed by the importer that the imported powder should be classified as sponge iron powder under TSUS item 608.02 at the duty rate of 37 cents or 25 cents per ton, depending on the date of entry.

Evidence in a voluminous record compiled after trial discloses that U.S. Customs Laboratories at Chicago and Boston analyzed Atomet 28 samples and reported them to be sponge iron powder, that when Atomet 28 was first imported into the United States it was classified as sponge iron powder but that this classification was changed following the institution of a manufacturer's protest by a domestic competitor which culminated in a Customs Service ruling apparently relied upon in the classification of the imported powder, that the imported powder is produced in Canada in a manner similar to a process reported by the Tariff Commission as being recognized in the industry as a sponge iron process, and the microscopic examination of the imported powder reveals a mixture of particles with high density and low microporosity and particles with low density and high microporosity comparable to characteristics of the Mannesmann [Naeser] process which is described by a leading authority in the field of powder metallurgy, namely, Dr. W. D. Jones, as a sponge iron process.

Held, the evidence establishes that the imported merchandise is a porous iron powder which should be classified as sponge iron powder as recommended by government chemists. Furthermore, classification of the imported merchandise cannot properly be influenced by the government's reference to a "mixed powder" composition of the merchandise inasmuch as this reference is based upon an erroneous interpretation of Dr. Jones' "mixed particles" observation of characteristics exhibited by a sponge iron powder.

Court No. 72-3-00710

Port of Detroit

[Judgment for plaintiff.]

(Decided February 13, 1976)

Corington & Burling (Donald Hiss and Rodney E. Gould of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case, described on the invoices as Atomet 28 Iron Powder, was classified in liquidation upon entry at the port of Detroit, Michigan, under TSUS item 608.05 at the duty rate of 0.3 cents per pound as other powders other than alloy iron or steel. It is claimed in this action that the merchandise should be classified under TSUS item 608.02 as modified in T.D. 68-9 at the duty rate of 37 cents or 25 cents per ton, depending upon date of entry, as sponge iron powder.

The competing tariff provisions read:

[Classified]

Other powders:

Other than alloy iron or steel

[Claimed]

Sponge iron; iron or steel powders:

Sponge iron, including powders thereof:

Not containing chromium, molybdenum, tungsten, or vanadium in amounts specified in headnote 4 of this subpart

The record in the case is voluminous, covering some 925 pages of trial testimony given by eight witnesses, and includes extensive documentary exhibits and various samples of iron powders, compounds and other forms of iron and iron products, as well as the official papers. The merchandise at bar is covered by some 24 entries which were made by plaintiff as agent for Quebec Metal Powders Limited of Sorel, Canada, the manufacturer.

According to the official papers (placed in evidence by the government) a sample of the imported merchandise, Atomet 28, was subjected to analysis by government chemists at the United States Customs Laboratory in Chicago, Illinois, and reported by the laboratory to be "sponge iron powder containing no dutiable amounts of chromium, vanadium, molybdenum or tungsten." [See customs laboratory report, dated November 25, 1969, in entry No. 106504 of protest 3801-0-000035.] This was prior to liquidation of the subject entries. And the same reports were made by the United States Customs Laboratory in Boston, Massachusetts, following examination of samples of Atomet 28 taken from other shipments entered at the ports of Champlain and Buffalo, New York. [See exhibits 82 through 84.]

Apparently, classification of the instant merchandise proceeded upon the basis of guidelines contained in the headquarters ruling of September 14, 1971, wherein the Customs Service stated (exhibit 86):

If an imported powder is found to be truly porous throughout under microscopic examination [500X - 700X] of a ground and polished section, it should be classified as sponge iron powder under either item 608.02 or 608.04, TSUS, depending upon metallic content. If, on the other hand, the particles are generally solid at the core, the powder should then be classified either as other powder in item 608.05, TSUS, or as an alloy powder in item 608.06 or 608.08, TSUS, again depending upon metallic content.

In the event of any remaining doubt as to the proper classification, information as to the process by which the imported powder was made should be obtained. If the powder was produced by the solid state reduction of iron oxide below the melting point of iron, then the resulting product is sponge iron. If the imported powder was produced by atomization, or some other similar process involving heating the raw material to a molten state, the resulting product should be classified under one of the provisions for other powders.

But in the Summaries of Trade and Tariff Information (1967) the Tariff Commission, reporting on commodities under TSUS items 608.02 and 608.04, stated [exhibit 85, p. 57]:

Sponge iron is a porous spongelike material generally in the form of a cake and usually containing 96 percent or more of iron, the remainder being largely of carbon. In the United States sponge iron is produced principally by reducing uniform high-grade iron ore with coke at temperatures well below the melting point of iron. Sponge-iron powder, a virtually pure, finely divided, iron containing as much as 98.5 to more than 99 percent by weight of iron, is produced by pulverization of the sponge-iron cake. The pulverized iron is annealed in a hydrogen atmosphere to

eliminate the effects of the cold working (pulverizing) and also to further reduce the content of carbon and oxygen.

Sponge iron is also produced by the atomization of molten cast iron or steel scrap of carefully selected analysis. The atomization introduces oxygen into the material; however, the oxygen, as well as the carbon contained in the scrap, can be minimized by heat treatment. The heat treatment results in a cake of sponge iron which is converted to sponge-iron powder by milling.

And the findings of the Tariff Commission, relative to the existence of more than one process for the manufacture of sponge iron, find support in the published writings of Dr. W. D. Jones,¹ a noted English power metallurgist whom expert witnesses for both parties herein acknowledge as a leading authority in the field of powder metallurgy. [See exhibit 10, p. 47, wherein Dr. Jones calls attention to a number of "modern sponge iron processes".]

The method of manufacture of the imported merchandise, Atomet 28, is described in the testimony of Dr. Harry Durney, Jr., vice president of Quebec Iron and Titanium Corporation (the parent company of the exporter Quebec Metal Powders) in charge of planning and technology, with similar responsibilities for Quebec Metal Powders. According to Dr. Durney the process starts with molten iron containing 4 percent carbon which comes from the Quebec Iron and Titanium smelter. The initial step involves the granulation of the molten iron with water and air in order to disintegrate the particles. The disintegration causes the molten iron to be converted into coarse granules and the medium of air causes oxidation of the iron. The air is drawn through the atomization zone in order to oxidize the material.

The coarse granules are then dried, and then the granules are reduced in size by ball milling.

The ball-milled material is then passed through a reduction furnace. The furnace operates in a temperature range of 1,850 to 1,950 degrees Fahrenheit, which is below the melting point of iron. The atmosphere in the furnace is nitrogen and hydrogen which is created by the dissociation of ammonia. In the furnace, carbon and oxygen unite to form carbon monoxide and excess oxygen in the material reacts with the hydrogen present to form water vapor.

The discharge from the reduction furnace is a sponge iron cake. And this cake, a sample of which is in evidence as exhibit 5, is then put through an attrition mill which breaks it down to powder size. The powder is then screened, any oversizes are removed, and is finally

¹ Fundamental Principles of Powder Metallurgy (1960), pp. 47-50.

blended to obtain uniform powder, culminating in the product Atomet 28, a sample of which is in evidence as exhibit 6.

Dr. Durney further testified that when Atomet 28 was first imported into the United States in early 1969 it was classified by the Customs Service under TSUS item 608.02, which is the provision for sponge iron, and that the classification for this merchandise was subsequently changed.

Dr. Joel S. Hirschhorn, professor of metallurgical engineering at the University of Wisconsin and consultant to the powder metallurgy industry testified that he made an extensive visit in the manufacturing plant where Atomet 28 is made, and is familiar with its manufacture. Professor Hirschhorn corroborated the testimony of Dr. Durney to the effect that the product which comes out of the reduction furnace is a sponge iron cake which is mechanically broken up to produce the final sponge iron powder. Much of the testimonial and other evidence given by this and other witnesses who followed him goes into considerations of particle characteristics, testing procedures and apparatus and procedures for examining individual iron particles and groups of particles under high magnification with a view toward ascertaining whether or not the particles are sponge iron particles. Professor Hirschhorn stated that there is substantial porosity in Atomet 28, that this porosity is caused by the presence of iron oxide, and that in his opinion Atomet 28 is a sponge iron powder. And the witness also pointed out, among other things, that the breaking up of the sponge iron cake affects the distribution of the porosity.

Dr. Leander Pease, cofounder-owner of Powder-Tech Associates, Inc. of Burlington, Massachusetts, which engages in research, development, and engineering in all areas of powder metallurgy, testified that his company does consultation work for producers of metal powders and metal parts fabricators, among others, and that he gained familiarity with Atomet 28 from having examined samples of it in connection with industry consultations, and also gained familiarity with the manufacturing process as a result of having visited the plant in Sorel on several occasions. Dr. Pease stated, among other things, that the ball-milled feed material is put into a reduction furnace and that the product coming out of the furnace at the discharge end is "a sponge iron cake" which is later milled to achieve the final Atomet 28 product.

With respect to exhibit 72 (A & B) which represent scanning electron microscope micrographs of QMP Atomet sponge iron cake, Dr. Pease testified (R. 392-93):

Q. I show you Plaintiff's Exhibit number 72 and ask you to explain what it shows.

A. Exhibit 72 "A" and "B" are of the Q.M.P. Atomet sponge iron cake, which is the product that issues from the discharge end of the reduction furnace. In this case a piece of the cake was fractured, and then its fractured surface examined at 1350X and 2400X.

The most important feature to notice in this is that the particles that are present at this discharge end of the furnace indeed are porous.

Here's an example in the lower picture. In the upper left hand corner this particle clearly shows dark round porosity; so does this one down here on the lower left hand side. You can also see at this stage that there are, indeed, particles which are not porous, and I think that this elongated particle on the upper right hand side here doesn't show any evident surface porosity, although there are some other pieces laying here.

Q. Is there any theme that runs through both of those photographs?

A. Yes. We have to say that we're looking at a porous material here. There's no question about it.

And with respect to the nature of a pore of an individual powder particle of Atomet 28 examined at great length, Dr. Pease testified (R. 401-03):

Q. Dr. Pease, with specific reference to Exhibit 74, could you explain what that exhibit shows?

A. I could. What we have done in this case is taken a mount of the Atomet-28 powder, prepared in the way that I described before, but what we wanted to do was to see how the shape of an individual pore might change in a given particle as you went down through successive layers in that particle because generally when one examines a material by optical micrograph one is looking at one plane. What we will show here is that if you look at different planes with the same particle you see somewhat different things. So that you have to be a little careful in conclusions that you draw from this one picture. We found one particular pore which had a characteristic shape to it and that characteristic shape was this triangular pore. We didn't hunt around for a particularly spongy particle or substantially solid one but really only a pore that could be readily identified. And this we did because we have to go and polish this thing for a certain length of time and then go back and find the same particle amongst several millions of others. It takes a careful procedure to be sure you can find the same particle. We were able to do that successfully. So, the picture then from the left to right in here show what the results were on that one particular particle after polishing. The numbers below it represent the cumulative material we removed in inches. They are very small numbers. But the sum total from this end down to here is about a half a thousand or five ten-thousandths of an inch material removed. You can see that first of all this pore is not just some artifact right at the surface but that it runs in a very definite finite depth in toward here ending

up rotated about 90 degrees and down, as it appears over here. Another interesting thing, you can take something relatively solid at this end or view and polish off half a thousandth of an inch and you have got something that looks like a very porous kind of particle. So it helps point out very graphically the problems in what you can learn in the polishing. . . .

Dr. Pease stated that he considers Atomet 28 to be porous, and that it is a sponge iron powder. He also pointed out that in the QMP process the iron oxide is deliberately introduced during the "granulation step", and that there are several different methods of manufacturing sponge iron powder, depending upon the starting feed material which is used.

Other witnesses who testified in the case do not appear to have seen the manufacturing process underlying Atomet 28, but appear to have examined the powder itself in various ways. Dr. Eric John Chatfield, senior research scientist at the Ontario Research Foundation near Toronto, Canada, and head of the electron optical laboratory, testified that he examined samples of Atomet 28, among other iron powders, under a scanning electron microscope, an electronic device which he described in some detail. He concluded from his examination of Atomet 28 that its small particles are more porous than its large particles, and that porosity in the particles examined extends from the surface down into the interior of the particles.

So much for testimony elicited from witnesses called on plaintiff's behalf.

Defendant called four witnesses on its behalf. George Abbott, vice president and general manager of A. O. Smith-Inland Powder Metallurgical Division who supervises the production, planning and direct research of the metal powder operation, testified that he examined samples of Atomet 28 and is familiar with the process by which it is made. [The record does not indicate how he acquired his familiarity with the Atomet 28 process.] He stated that he does not consider Atomet 28 to be a sponge iron powder although it has porosity because its manufacture involves a liquid stage which indicates its classification to be an "atomized" powder.

Athan Stosuy, manager of new product development at Hoeganaes Corporation testified that his duties include keeping track of competition, evaluating materials and determining his company's competitive position among its competitors, that Hoeganaes competes with Quebec Metal Powders in the sale of iron powders in the United States, and that such competition extends to the product Atomet 28. The witness testified that Hoeganaes filed an American manufacturer's protest with the Customs Service asking that Atomet 28 be classified not as a

sponge iron powder but as other iron powders, and that this protest culminated in a new ruling by the Customs Service which is reflected in exhibit 86, *ante*.

Mr. Stosuy testified that he received samples of Atomet 28 in various stages of production, conferred and collaborated with Dr. Henry Hausner in having tests and examinations made on these samples with a view toward characterizing the powder and ascertaining the oxygen content and oxide distribution at different stages of production. According to the witness the oxygen content after atomization was found to be 6.1 percent which represents 24.4 percent iron oxide by weight. The carbon content was found to be relatively high at 2.74 percent which made the powder very brittle. The ball-milled material had generally finer sized particles, and the oxygen content was found to be 5.18 percent which represents about 21 percent iron oxide by weight. In looking at exhibit S, a photomicrograph of Atomet 28 annealed cake taken at a magnification of 200X, Mr. Stosuy stated that the view shown represented a true cross section since the material is sintered together and had no chance to separate. The porous particles were mainly confined to the finer sizes, and the spongy particles outnumbered the solid particles but the solid particles outweighed the spongy particles. The ratio of porous particles to solid particles was said by the witness to be in the order of 17/93 which he could not consider to be a sponge iron powder, viewing the powder as a whole.

When asked by the court what the value of porosity was, Mr. Stosuy said that it was the particles' ability to hold together when they are pressed—referred to as "green strength". The witness was of the opinion that in order for a powder to be called a sponge iron powder it would have to be porous in essentially every particle. And he said that he considered Atomet 28 to be an atomized powder.

Dr. Henry H. Hausner, a consulting engineer in powder metallurgy, editor of powder metallurgy books and journals, and a teacher in powder metallurgy, testified that the characteristic of sponge iron powder is interconnected porosity extending from the center of the particle to its surface in the manner of an ordinary sponge. He stated that when he received samples of Atomet 28 to which Mr. Stosuy referred he decided to separate the fine particles from the coarse particles. His experience had been that the fine particles have different characteristics than the coarse particles. He also ordered an apparent density measurement on samples, followed by microscopic investigation. He said that in looking at hundreds of views of Atomet 28 he saw four different type of particles, i.e., particles which did not contain any porosity, particles which contained only surface

porosity, particles with partial porosity, and particles which were perfectly spongy.

Dr. Hausner estimated on the basis of his examination of Atomet 28 samples that the powder consisted of approximately 20 percent sponge iron particles, in consequence of which, he did not consider Atomet 28 to be a sponge iron powder, but believes it to be a "mixed powder", containing a minority of spongy particles by weight. And Dr. Hausner agreed with the statement from an article authored by Messrs. Leadbeater, Northcott and Hargreaves on page 90 of the book *Iron Powder Metallurgy Book* which he edited, and which reads "The specific surface of iron powders is not independent of the porosity of the bed, owing to the presence of a double system of porosity; there is one system around the powder particles and the other inside them."

Harry Ambs, a powder metallurgist employed as manager of technical service for the metals group of Glidden Metals, testified that he was also of the opinion that Atomet 28 was a mixed metal powder, and not an atomized powder as he had originally thought it to be based upon his examination of a sample when it first came out on the market and the manufacturer's literature available at that time. From the evidence given at the trial in this case the witness said that he was of the opinion that Atomet 28 possessed some particles of low density, high porosity, and some particles of high density and low porosity as the end product of a manufacturing process similar to the Mannesmann process which he says Jones regards as producing a mixed metal powder. And he does not consider Atomet 28 to be a sponge iron powder because the solid, dense particles predominate by weight in this powder.

Mr. Ambs did admit, however, that every particle of an iron powder need not be porous in order for the powder to be designated a sponge iron powder. And he pointed to a number of solid particles in photomicrographs and SEMs of an Ancor MH100 powder which was acknowledged to be a sponge iron powder. He also stated that the tests he would perform on Atomet 28 in order to determine if it is a sponge iron powder would include tests of its compressibility and green strength. He had previously pointed out that one of the weaknesses of an atomized powder was its low green strength.

Plaintiff argues that a limited amount of iron oxide can result in a powder that is very spongy and definitely a sponge iron powder, that the feed material need not be 100 percent iron oxide in order to produce a sponge iron powder, and that Atomet 28, when judged as a whole as it should be judged, is a sponge iron powder and not a mixed powder (brief, p. 62).

Defendant argues (brief, pp. 44, 47):

The Government does not dispute the fact that there are sponge iron particles in Atomet 28. There is a controlled amount of iron oxide which is formed during the atomization process which subsequently becomes sponge iron after completing the annealing reduction process.

Since an amount of sponge iron does exist, we then must look to see what amount of sponge iron is produced in Atomet 28. . . .

* * * * *

It is manifest from the uncontradicted chemical analysis which Mr. Stosuy conducted on Atomet 28, in its various stages of production, that the sponge iron content of Atomet 28 is in the minority by weight when compared to the solid atomized particles. The only source of sponge iron in Atomet 28 is the iron oxide which is created during the atomization process. The iron oxide content is controlled and geared to the carbon content of the molten material which is to be atomized. Since the sponge iron content of Atomet 28 is relatively small, the presence of such a small quantity, by weight, of sponge iron should not be controlling in determining its classification.

Defendant goes on to conclude that Atomet 28 is not a sponge iron powder although the small sponge iron particles are distributed throughout the powder because porosity *does not occur throughout all the particles*.

The evidence in the record shows that the feed material for the manufacture of Atomet 28, the imported merchandise, is artificially produced by a process which includes an atomization step. However, after the creation of this iron oxide material and ball milling of it, the record shows that the material is subjected to solid state reduction and annealing steps to produce the cake, the basic product from which the imported merchandise is derived by pulverization.

The government chemists at two separate regional laboratories have analyzed the imported merchandise and other importations of it on separate occasions and have concluded that it is sponge iron powder, and this, both before and after guidelines were handed down by the Customs Service regarding the classification of such merchandise. Moreover, the Tariff Commission, whose many functions include the monitoring of the origins of imported merchandise and their uses in commerce and industry, reports that products manufactured in the two-stage method described for the production of the instant merchandise, i.e., liquid state production of iron oxides followed by solid state reduction of the oxides, are recognized in the industry as sponge iron powder—a posture which is supported by the testimony of at least half of the powder metallurgists giving testimony

in this case. And the government concedes in this case that some sponge iron exists in the imported merchandise.

What the case comes down to then is how significant is the government's "mixed powder" concept and balancing of particles as a predicate for sustaining classification of the subject merchandise in the face of such cogent evidence that the instant merchandise is sponge iron powder.

Defendant states (brief, p. 57):

... The mixed powder theory is not new since Dr. Jones in his *Fundamental Principles of Powder Metallurgy* (introduced by plaintiff) considered Mannesmann RZ process to produce a mixed iron powder. This Mannesmann process is similar to the process used for the production of Atomet 28. . . .

Undoubtedly, this argument reflects the testimony of defendant's witness Amb's previously noted herein who, like the other powder metallurgists who testified in the case, considers Dr. Jones to be a well respected authority in the field of powder metallurgy.

In the court's view both counsel for the government and Mr. Amb's have misread Dr. Jones' statements in this instance. The words "mixed powder" were not employed by Dr. Jones, but by Mr. Amb's. Dr. Jones used the phrase "a mixture of particles with high density and low microporosity with particles of low density and high microporosity" in discussing the characteristics of the powder product of the Ferrum process. [Exhibit 10, p. 48.] And the words "mixed particles" do not bear the same meaning in this context as the words "mixed powder" because Dr. Jones is discussing only sponge iron powders under the heading REDUCTION OF OXIDES [exhibit 10, p. 8], and is comparing the advantages and disadvantages of the various sponge iron powders produced by different methods. Thus, according to Dr. Jones, the Mannesmann process [Naeser] is deemed to be a more expensive process than a *typical sponge iron process* because of its three-stage tier, i.e., preparation of melt, atomization, and reduction, but that at the same time the Mannesmann process is capable of much larger expansion in the future than the Hoeganaes process, among others, because of its independence of magnitude of supply of selected concentrates, among other things. [Exhibit 10, p. 50.]

Therefore, contrary to the assertions made by government counsel and the witness Amb's, it is clear that the concept of mixed particles in an iron powder is compatible with the designation of that powder as sponge iron as is manifest in the documented research of a renowned and respected powder metallurgist. And no attempt is made to

differentiate between the mixed particles in terms of respective weights for any purpose. Moreover, in its "mixed powder" argument, defendant's rejection of the solid, irregular particles is based upon a consideration of only intra-particle porosity. But inasmuch as the value of porosity is said to relate to the green strength rating of a compressed powder it is clear that the efficacy of inter-particle porosity, a pertinent factor recognized by the government's witness Hausner, must necessarily be taken into consideration even with respect to these seemingly solid and irregular shaped particles in the evaluation of the powder mass.

Certainly, the credible evidence in this case indicates that no iron powder reputed to be sponge iron powder contains intra-particle porosity in every particle. And from the court's own examination of the micrographs² of both the cake and powder forms of Atomet 28 the court is of the opinion that substantial intra-particle porosity exists in this product such that it can be said to be a porous iron powder. Consequently, the court finds no merit in the government's "mixed powder" theory, and it should not influence the classification of the instant merchandise.

Furthermore, it should be noted that the guidelines handed down by the Customs Service (exhibit 86) do not *ipso facto* mandate classification of iron powders by the administrative officials at the ports of entry, but leave the determination of classification to those officials charged with the responsibility for scrutinizing and analyzing the powders. Under the circumstances of this case the court is of the view that the district director should have followed the recommendations of the Customs chemists at Chicago who reported the subject merchandise to be sponge iron powder.

For the reasons stated, the claim of the plaintiff is sustained. Judgment will be entered accordingly.

² (That includes slides of stereo pairs projected onto a movie screen in the courtroom during the trial which very convincingly disclose in three dimensions the in-depth porosity of Atomet 28 powder particles)

Decisions of the United States Customs Court *Abstracts* *Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, February 17, 1976.

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED		HELD		BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate	Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/23	Richardson, J. February 10, 1976	Amplifone Corporation	66/4135, etc.	Item 683.10 12.5% Item 682.07 11%, 10% or 8.5%	As assessed, with allowance un- der item 807.00 for cost or value of articles			General Instrument Corpo- ration v. U.S. (C.D. 4507; C.A.D. 1128)	Chicago American goods returned; transformers

P7633	Watson, J. February 10, 1976	N. H. M. Corporation	71-8-00715, etc.	Without allow- ance under Item 807.00	marked "A" (fabricated components, the product of U.S. on in- voices	Armbree Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corpora- tion et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4390)	Los Angeles Merchandise In c.v. of plastic
P7634	Ford, J. February 11, 1976	Standard Import and Export Corp.	73-11-03037	Item 633.30 19%	Item 683.05 4%	Judgment on the pleadings Washawsky & Company v. U.S. (C.D. 4410)	Los Angeles Automobile fog lights
P7635	Watson, J. February 11, 1976	The Akron	73-11-03038	Item 748.30 22% or 21%	Item 774.60 10% or 8.5%	Judgment on the pleadings Armbree Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corpora- tion et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4390)	Los Angeles Plastic fern with brown holder
P7636	Maletz, J. February 11, 1976	Stahlwood Toy Mfg. Co., Inc.	73-3-00672	Item 737.90 21% or 17.5%	Item 737.55 12.5% or 10.5%	Judgment on the pleadings	New York Snap blocks, etc.

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FEBRUARY 6, 1976

Arnold Pickle & Olive Co. v. United States, Court No. 73-1-00128.—
VEGETABLES IN BRINE.—C.D. 4620. Motion by plaintiff
dismissed.

Judgment of the United States Customs Court
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FEBRUARY 11, 1976

APPEAL 75-15.—The Acme Shear Co. v. United States.—GREY
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